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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Conservatorship of the Person and Estate of ANNE S. ANDERSON.	
ANNE F. SMITH, as Conservator, etc., Petitioner and Appellant, v. SHARON SMITH et al., Objectors and Respondents.	A132474 (Marin County Super. Ct. No. PRO1002583)

Anne F. Smith (Conservator), the conservator of the person and estate of Anne S. Anderson (Wife), appeals an order of the trial court denying her petition for substituted judgment, in which she sought authority to execute a new trust and will and to retain litigation counsel. We shall reverse the order.

I. BACKGROUND

A. The Estate Planning Documents

Wife and her husband, Curtiss M. Anderson (Husband), created a revocable trust in 1996. The 1996 trust provided that while both Husband and Wife were living, the trust could be "modified or amended by either settlor acting alone as to any separate and quasi-community property of that settlor, and by both settlors acting jointly as to any community property of the settlors." The trust documents included a schedule of

community property assets, which listed real property, bank and investment accounts, stocks, and bonds. The documents did not list any separate or quasi-community property.

Under the 1996 trust, after the death of one spouse, "the remaining trust estate [would] be distributed outright to the surviving settlor." However, "[a]ny property or portion of property that [was] disclaimed by the surviving settlor [would] be held, administered, or distributed according to the terms of the Disclaimer Trust." The Disclaimer Trust would be irrevocable and not subject to amendment. Until the death of the surviving spouse, the trustee would pay to the surviving spouse the income of the Disclaimer Trust, and the principal necessary for the surviving spouse's health and support. After the death of the surviving spouse, the income would be divided among various named individuals, primarily Husband and Wife's siblings, nieces, and nephews.

In February 2010, Husband and Wife executed an "Amendment and Restatement of the [1996] Curtiss M. Anderson and Anne S. Anderson Revocable Trust," which stated that both Husband and Wife were empowered to amend the 1996 trust and "do hereby amend such trust." The February 2010 trust provided that upon the death of one spouse (the predeceased spouse), the "Survivor's Share," consisting of the surviving spouse's one-half interest in the community estate and the surviving spouse's separate estate, if any, would be distributed to the surviving spouse and held in a Survivor's Trust. With certain exceptions, the remainder of the predeceased spouse's share of the trust estate would be held in a Bypass Trust. The surviving spouse would receive the income from the Bypass Trust and any principal the trustee deemed necessary for the surviving spouse's health and support. Upon the death of the surviving spouse, the estate would be divided among Husband and Wife's beneficiaries: If wife were the predeceased spouse, the residue of the Bypass Trust would be divided among her two nephews and Husband's two nieces. If she were the surviving spouse, the residue of the Survivor's Trust would be divided in the same way. If Husband were the predeceased spouse, the residue of the Bypass Trust would be divided as follows: 12.5 percent to Camie Sumrall, a care custodian; 12.5 percent to Sharon Smith, a care custodian; 5 percent to Shelly Fuqua Junker, a care custodian; 20 percent and 15 percent, respectively, to his two nieces; 20

percent and 10 percent, respectively, to Wife's two nephews; and 5 percent to a step-niece. If Husband were the surviving spouse, the residue of the Survivor's Trust would be divided in the same way. Attorney Robert Pollak prepared the trust document.

After the original February 2010 trust documents were lost, Pollak prepared a new trust document, entitled "Amendment and Restatement of the Curtiss M. Anderson and Anne S. Anderson Revocable Trust," which Husband and Wife executed on April 2, 2010. As relevant here, the April 2010 document differed from the February 2010 version in the amounts given to Husband's beneficiaries: upon the death of both spouses, the caretakers Sumrall and Sharon Smith would each receive 15 percent of Husband's share, caretaker Junker would receive 5 percent, Husband's two nieces would receive 15 percent and 20 percent; Wife's two nephews would receive 20 and 5 percent, and Husband's step-niece would receive 5 percent. That is, the amount given to the caretakers Sumrall and Sharon Smith was increased by a total of 5 percent from the amount in the February 2010 trust, and the amount given to one of Wife's nephews was decreased by the same amount.

A "Second Amendment and Restatement" was executed on May 7, 2010. The amounts given to the beneficiaries upon the death of both Husband and Wife did not change from those specified in the April 2010 restatement.[1]

Husband died on May 22, 2010.

B. The Petition and Supporting Evidence

Conservator was appointed as Wife's temporary conservator on May 27, 2010. She was appointed as general conservator of Wife's person and estate on August 23, 2010.

[1] It appears that the May restatement included provisions required by Franklin Templeton Bank, the successor trustee.

On February 23, 2011, Conservator filed the petition for substituted judgment at issue here.[2] She proposed the following: First, that all of Wife's prior wills, trusts, powers of attorney, and advance health care directives be revoked. Second, that a revocable trust and pour-over will be created that would divide Wife's estate into two equal shares at the time of wife's death. Half would pass to Husband's brother, or, if he did not survive Wife, in equal shares to his two daughters, and the other in equal shares to Wife's two sisters, with her nephews as alternate beneficiaries. Third, Conservator would be authorized to execute the will and trust. Fourth, Conservator would be authorized to place all conservatorship assets into Wife's trust in order to terminate the conservatorship of the estate and thereby avoid additional fees and costs to the estate.

According to the petition, Husband hired Home Helpers to provide 24-hour care for him and Wife in late 2008. Sumrall and Sharon Smith were the owners of Home Helpers, and Junker was one of the caregivers. Conservator learned from viewing emails between Husband and his friends that Husband became infatuated with Sharon Smith; the emails spoke of him wanting to marry her if he had been younger, planning trips with her, wanting to run off with her, and loving her, and of her telling him she would buy him a Mercedes convertible. Throughout 2009 and early 2010, Sharon Smith and Sumrall would have lunch with Husband frequently and give him alcoholic drinks, although he was an alcoholic. Sharon Smith and Junker were seen climbing onto Husband's bed, holding him and stroking him. In November 2009, Junker got a $1,600 check from Husband, with the amount of the check written in her own handwriting.

Husband began interviewing professional fiduciaries to serve as Wife's conservator in late 2009, because of his impending death from cancer and his concern about Wife's dementia and severe alcoholism. Around the same time, he began making

[2] The Petition was captioned: "Petition for Substituted Judgment for Authority for Conservator to Execute New Trust and Will and Assignment and Deed for Conservatee, for Revocation of All 2010 Estate Planning Documents Executed by Conservatee, for Authority to Place All Conservatorship Assets into New Trust, and for Authority to Retain Litigation Counsel to Investigate and to Pursue All Appropriate Legal Actions Against Attorneys."

changes to the estate plan with Pollak**.** The petition alleged Pollak introduced Husband to a professional fiduciary who might serve as Wife's conservator.[3] He then prepared the February, April, and June 2010 trust documents for Husband and Wife to sign. Pollak arranged for Clyde H. Charlton to conduct an independent review of the April 2010 trust, which included bequests from Husband's share of the community property to the caregivers, Sharon Smith, Sumrall, and Junker. When Conservator's attorney asked for Charlton's notes from his review, Charlton said he had no notes, that he had spoken only with Husband, not with Wife, and that he knew nothing of Wife's condition or her position on such gifts.

C. Wife's Mental State

The petition alleged that Wife's doctor had referred her for an evaluation by a clinical psychologist, Tessa ten Tusscher, in July 2009. Dr. Tusscher's evaluation found deficits in a number of areas; in particular, Wife had moderate and specific deficits in memory, and moderate deficits in reasoning, judgment, insight, and executive functioning. She also had mild deficits in orientation; although she was oriented as to place, person, and time, she did not know the current president or her own age. Dr. Tusscher concluded Wife had "marked deficits in immediate and short-term memory, judgment, mental flexibility and executive functioning." Dr. Tusscher also noted that Wife suffered from vascular dementia, that Wife had alcohol and nicotine dependence, that Wife saw no reason to change her drinking or smoking, and that she was "in denial about her alcoholism."

Conservator arranged to have Wife evaluated in July 2010 by Jonathan Mueller, M.D., a forensic expert certified in neurology and psychiatry. Dr. Mueller found Wife had " 'basic impairments in four areas: 1) attention and registration . . . ; 2) short term memory loss which is dramatic . . . ; 3) impairments in orientation (She did not know the

[3] Pollak denied that he introduced Husband to the proposed conservator, and denied that he had Wife execute any documents believing she was " 'not likely to have capacity . . .' to execute the documents and needed a conservatorship." He alleged that he met with the potential conservator on April 14, 2010, to discuss care management for Wife in the event of Husband's death.

year, the day of the week, the date of the month, or time of day); 4) and visual spatial skills . . . .' " Wife had no recollection of changing her estate plan in February, April, and May 2010 or of leaving anything to the caregivers, and she believed Husband would have discussed such a gift if he had wished to make one. She did not recall participating in an alcohol rehabilitation program three years previously, did not know why she had lost her driver's license, and did not know what her medical problems were. She could not initially recall the name of Husband's nieces. When asked the value of her estate, she estimated it as being about $500,000, which she thought was the approximate value of her home. She was unable to say how much she had in her checking or savings accounts, and denied having stocks, bonds, certificates of deposit, or investments of any kinds. She did not know if she had an individual retirement account.[4] She said that if she were preparing a will, she would want to leave her estate in equal portions to her two sisters. She did not recall any details of her former testamentary disposition. Dr. Mueller stated: "I conclude that Ms. Anderson currently lacks testamentary capacity and has not possessed it at any point in the last twelve months" and she "likely would have had diminished ability to resist undue influence from any individual(s) willing to play an active role either in providing her with alcohol or in continuing to allow her to abuse alcohol and nicotine despite repeated admonitions of [Wife's primary care physician] that she give up alcohol and cigarettes."

Dr. Mueller also reviewed Husband's medical records and emails, and opined that "[t]he combination of severe crippling cardiovascular, pulmonary and arthritic problems . . . followed by lung and kidney cancer in an alcoholic octogenarian likely served, in my medical opinion, to diminish Mr. Anderson's capacity to withstand undue influence."

[4] The petition indicates the value of Wife's home was higher than her estimate, and that she had significant assets in the form of the proceeds of Husband's life insurance policy and investments in her and Husband's IRA and trust accounts.

Based on her review of the evaluation reports, Conservator believed Wife had advanced dementia when she executed the 2010 estate documents, and she alleged that the documents were invalid.

The petition alleged that when Conservator's attorney spoke with Pollak on May 14, 2010 and told him of the petition for a conservatorship, he told her it was " 'highly likely that [Wife] has advanced dementia,' " and said, " 'She's losing it, losing it!' " It also alleged that in February 2011, Pollak told Conservator's attorney that Wife had " 'questionable capacity' " when he was preparing documents.

D. Objections to Petition and Supporting Evidence

Sharon Smith and Sumrall filed an objection to the petition in which they requested an evidentiary hearing to determine whether the 2010 estate planning documents should be revoked.

Pollak also objected to the petition, to the extent it sought to use conservatorship funds to investigate or pursue a claim against him.[5] He averred that he met Husband in December 2009. Husband and Wife had been referred to him by Wife's care manager, who advised Pollak that Wife was an alcoholic and chronic smoker, but did not tell him Wife had dementia or was incapacitated. Consequently, he was "very careful in interviewing [Wife and Husband] concerning their desire to make changes to their then current estate plan." He met with Husband and Wife, and had a "long substantive discussion" with Wife about her life, her family, and her satisfaction with the care she was receiving. He also had a "detailed discussion" with Husband and Wife about their relatives and proposed beneficiaries. After the discussion, Pollak concluded Wife had "sufficient mental capacity to execute an estate plan." He discussed with Wife "three major defects" in the 1996 trust: certain tax consequences, the fact that the surviving spouse could change the beneficiaries of the community property half of the predeceased spouse, and the fact that under the 1996 trust, probate proceedings might be necessary

[5] Pollak has not filed a respondent's brief on appeal. The only respondent's brief was filed by Sumrall and Sharon Smith, whom we shall occasionally refer to as "respondents."

after the death of the second spouse. Pollak asked Wife "if it would be OK with her, if she died first, if her husband changed her chosen beneficiaries. She said no and that she wanted the Trust revised to prevent the surviving spouse from changing the beneficiaries of the first spouse to die," and that she wanted the trust revised to remedy the "defects" Pollak identified. Husband and Wife executed the February 2010 restatement, but the documents were apparently lost. The trust was re-executed on April 2, 2010. Pollak referred Husband to three attorneys to interview him and execute a certificate of independent review, because Husband's dispositive provisions included gifts to caregivers. One of the attorneys, Charlton, executed the certificate of independent review. Pollak prepared the May 2010 trust documents in order to include provisions required by Franklin Templeton Bank, the successor trustee. Pollak denied that he had told Conservator's counsel that it was likely that Wife had advanced dementia, that she was "losing it," or that she had questionable capacity when he was preparing the documents.

Dr. Tusscher submitted a declaration on Pollak's behalf stating her opinion that at the time of the July 2009 evaluation Wife "did not have major deficits and had the capacity to understand the nature of her acts and had the capacity to make an estate plan, provided the estate plan was not extremely complex."

E. Wife's Court-Appointed Attorney's Report

Wife's court-appointed attorney, Eliot Lippman, filed a report on April 20, 2011. Lippman averred he had met with Wife, and that she did not object to the petition. Wife had no memory of executing any of the 2010 trust documents. She remembered Sharon Smith and Sumrall, and said she was surprised by and disapproved of the gifts to them. Wife's long-term memory appeared to be intact, she could identify family members, and she approved of Conservator's proposed distribution of the trust assets. Lippman believed Wife lacked the requisite capacity to understand and knowingly execute the three 30-page trust documents. Lippman believed the 2010 trust documents were the product of undue influence and should be revoked, and that disposition of assets provided

for in the 1996 trust documents, including specific gifts of tangible personal property, should be restored.

F. The Trial Court's Ruling

Ruling on the petition, the trial court noted that Charlton's April 9, 2010 certificate of independent review was facially valid. The court went on to rule: "The result of the substituted judgment petition would be to revoke the Bypass Trust, which became irrevocable when Curtiss Anderson died and to subvert Curtiss Anderson's apparent testamentary wishes regarding his separate property and his half of the parties' community property. . . . This court will not posthumously rewrite Curtiss Anderson's estate plan based on the allegations in this Petition for Substituted Judgment. [¶] [Conservator] argues that since there was no independent review of the 2010 estate plans conducted for Anne Anderson, the gifts to care providers should be nullified. This argument is not persuasive. [Conservator] admits that the Bypass Trust was to be funded from Curtiss' portion of the estate. Curtiss was at liberty to designate the disposition of his separate property and/or his half of the community property, even in a jointly executed Trust Declaration." The court ordered as follows: The petition was denied to the extent it sought to amend the Bypass Trust. The court assumed Conservator would wish to submit a revised petition for substituted judgment, addressing the Survivor's Trust only, and made no orders as to the Survivor's Trust. Conservator was not permitted to execute a will for Wife or transfer property in a manner that was at variance with the 2010 Bypass Trust provisions. The request to retain litigation counsel was denied without prejudice; the court would consider the matter further if Conservator initiated litigation against Pollak or Charlton.

II. DISCUSSION

A. Substituted Judgment Statutory Scheme

"Probate Code section 2580 provides for an order which authorizes or requires the conservator to take a proposed action for the purpose of (1) benefiting the conservator or the estate; (2) minimizing current or prospective taxes; or (3) providing gifts to persons or charities which would be likely beneficiaries of gifts from the conservatee."

(*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 552.) In deciding a motion for substituted judgment, "the court shall take into consideration all the relevant circumstances." (Prob. Code,[6] § 2583.) Those circumstances may include 13 circumstances listed in section 2583, including whether the conservatee has or is likely to recover legal capacity for the proposed transaction; the conservatee's past donative practices, traits, and wishes; the relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objectives of the conservatee's bounty; any known estate plan of the conservatee; the manner in which the estate would devolve upon the conservatee's death; and the likelihood that the conservatee would take the action as a reasonably prudent person if the conservatee had the capacity to do so. (§ 2583.)

"After hearing, the court, in its discretion, may approve, modify and approve, or disapprove the proposed action and may authorize or direct the conservator to transfer or dispose of assets or take other action as provided in the court's order." (§ 2584.) The court in *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1254, explained the duty of the trial court in considering a substituted judgment motion: "The superior court's primary function under the substituted-judgment statute will be to make a decision (as the conservatee would if able) on the basis of information furnished to it. The information the superior court receives may or may not be consistent: If there are issues of fact the court of course must determine whether the issues are material to the decision to be made and then resolve any issues it deems material." When considering a substituted judgment petition, "the trial court determines whether the information presented in the petition is sufficient or whether a full contested evidentiary hearing is required." (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 398; see also *Conservatorship of McElroy, supra,* 104 Cal.App.4th 536, 554.) For instance, an evidentiary hearing may be unnecessary where "circumstances such as a need to reduce tax liabilities [] make it obvious that action is required." (*Conservatorship of McElroy, supra,* 104 Cal.App.4th at p. 554.)

[6] All undesignated statutory references are to the Probate Code.

B. Wife's Capacity to Amend the 1996 Trust

Conservator contends the trial court improperly failed to consider wife's incapacity to execute the 2010 amendments to the trust.

There is a rebuttable presumption that all persons have the capacity to make decisions, and a person with a mental disorder may still be capable of executing wills or trusts. (§ 810, subds. (a) & (b).) A decision that a person lacks capacity to execute a will or trust must be supported by evidence of a deficit in at least one of a number of mental functions, including orientation to time, place, person, and situation; ability to attend and concentrate; short- and long-term memory; and ability to understand and appreciate quantities. (§ 811, subd. (a).) A deficit may be considered only if, by itself or in combination with other deficits, it "significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of action or decision in question." (§ 811, subd. (b).)

Under section 6100.5, subdivision (a)(1), an individual is not competent to make a will if at the time of making the will, "[t]he individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendents, spouse, and parents, and those whose interests are affected by the will." Courts may apply these standards in deciding whether a person had the ability to understand the consequences of his or her actions in executing trust documents: "When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, . . . it is appropriate to look to section 6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability 'to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.' (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils." (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 731 (*Andersen*).)

However, " '[i]t is well established that "old age or forgetfulness, eccentricities or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity." [Citations.] "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity." [Citation.] Nor does the mere fact that the testator is under a guardianship support a finding of lack of testamentary capacity without evidence that the incompetence continues at the time of the will's execution.' " (*Andersen*, *supra*, 196 Cal.App.4th at p. 727.)

In connection with her petition, Conservator alleged and presented evidence that Wife lacked capacity to execute the 2010 trust documents. In particular, there was evidence that she had dementia, and—in an evaluation two months after she executed the last 2010 document—that she was impaired in her ability to attend, that she had dramatic short-term memory loss, and that her orientation as to time was impaired. There was also evidence that in July 2010, she had no memory of having changed her estate plan two months previously and that she was surprised by and disapproved of the gifts to Sumrall and Sharon Smith. Dr. Mueller opined that Wife lacked testamentary capacity and that she had not had it for the past year. There is also evidence—which Pollak denies—that Pollak told Conservator's attorney that Wife likely had advanced dementia, that she was "losing it," and that she had " 'questionable capacity' " when he was preparing documents. In addition, the petition contains an allegation that in late 2009, Husband began interviewing professional fiduciaries out of concern for Wife's dementia and alcoholism, as well as an allegation—which Pollak denied—that Pollak introduced Husband to a professional fiduciary who might serve as Wife's conservator.

The trial court did not address any of this evidence, and indeed, entirely ignored the issue of Wife's capacity when it made its order. Rather, the court relied entirely on its view of *Husband's* right to dispose of his community property share of the estate, and its concern that the effect of granting the petition would be to revoke the Bypass Trust,

which became irrevocable when Husband died. In doing so, the court failed to address the question of whether the trust amendments were effective in the first place to the extent they changed the disposition of the couple's community property.

The 1996 trust provided that, while both spouses were living, "*[a]ny trust created by this instrument may be modified or amended* by either settlor acting alone as to any separate and quasi-community property of that settlor, and *by both settlors acting jointly as to any community property of the settlors*." (Italics added.) The court in *King v. Lynch* (2012) 204 Cal.App.4th 1186, considered a similar provision of a trust. There, a married couple executed a revocable trust that provided, in pertinent part, " 'During the joint lifetime of the Settlors, this Trust may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee, and with respect to separately owned property by an instrument in writing signed by the Settlor who contributed that property to the Trust, delivered to the Trustee." (*Id*. at p. 1188.) After the wife suffered a brain injury that left her incompetent to handle her own affairs, the husband executed three amendments to the trust, which reduced the monetary bequests to the couple's children and grandchildren. (*Id*. at p. 1189–1190.) The court concluded that these amendments were ineffective. In doing so, it relied on section 15402, which provides: "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." The court ruled that section 15402's qualification " '[u]nless the trust instrument provides otherwise' indicates that if any modification method is specified in the trust, that method must be used to amend the trust." (*Id*. at p. 1193.) Because the trust specified a modification method that required the signature of both spouses, the amendments signed by only the husband were ineffective. (*Id.* at p. 1194.)

Similarly here, the trust specified a method for amending the trust as to community property, a method that required the action of both Husband and Wife. By their terms, the 2010 trust documents amended and restated, rather than revoked or terminated, the 1996 trust, and respondents do not contend that they acted as a

revocation. Thus, Wife's agreement was necessary to amend the trust to alter the trust's disposition of Husband's one-half share of the couple's community property. In failing to consider, and decide, whether Wife had the capacity in 2010 to amend the 1996 trust, the trial court erred.

We are not persuaded otherwise by respondents' citation to *Conservatorship of Hart, supra,* 228 Cal.App.3d at p. 1265, for the proposition that section 2583 does not require the superior court to "make express findings as to the circumstances it considers" when deciding a substituted judgment motion. Respondents suggest we should therefore conclude the trial court implicitly found Wife had capacity. The order here, however, suggests strongly that the trial court failed to consider that question, rather than deciding it implicitly. In the circumstances of this case, it is appropriate to remand the matter to the trial court to hold an evidentiary hearing and decide whether Wife had capacity to execute the 2010 trust documents.

C. Gift to Care Custodian

Conservator contends the trial court erred in considering whether the provisions of the trust giving property to Sumrall, Junker, and Sharon Smith were invalid under the provisions of the Probate Code governing gifts to care custodians. Section 21350 et seq. sets out limitations on donative transfers by testamentary instrument, including trusts. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 799 & fn. 3; § 45.) "Section 21350 lists seven categories of persons who cannot validly be recipients of such donative transfers, including, inter alia, '[a] care custodian of a dependent adult who is the transferor' (*id.*, subd. (a)(6)). The statute provides that the term 'care custodian' for these purposes 'has the meaning as set forth in section 15610.17 of the Welfare and Institutions Code.' (§ 21350, subd. (c).)" (*Bernard, supra,* 39 Cal.4th at p. 799.) Welfare & Institutions Code section 15610.17 defines "care custodian" as "an administrator or an employee of any of [a list of types of] public or private facilities or agencies, or persons providing care or services for elders or dependent adults." Included in that list are "[h]ome health agencies" and "[a]ny other . . . person providing health services or social services to elders or dependent adults." (Welf. & Inst. Code, § 15610.17, subds. (c) & (y).) A

"dependent adult" includes a person older than age 65 who "resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age." (§ 21350, subd. (c) & Welf. & Inst. Code, § 15610.23.) Respondents do not contend they were not care custodians.

Section 21351 provides exceptions to the prohibition of gifts to a care custodian. One of those exceptions exists if "[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of [the care custodian], that the transfer was not the product of fraud, menace, duress, or undue influence." (§ 21351, subd. (d).) The statutory scheme thus establishes a rebuttable presumption of undue influence with regard to donative transfers from dependent adults to care custodians, rather than an absolute bar on such transfers. (*Estate of Winans* (2010) 183 Cal.App.4th 102, 113 (*Winans*).)

More relevant here, the statutory bar is overcome if "[t]he instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter: [¶] 'CERTIFICATE OF INDEPENDENT REVIEW [¶] I, _____ (attorney's name) have reviewed [¶] _____ (name of instrument) and counseled my client [¶] _____ (name of client), on the nature and consequences of the transfer, or [¶] transfers, of property to _____ (name of potentially disqualified person) [¶] contained in the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code

are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.' " (§ 21351, subd. (b).)

Clyde Charlton signed a certificate of independent review that tracked the language of section 21351, subdivision (b). In particular, the certificate stated he had reviewed the April 2, 2010 amendment and restatement of the 1996 trust, that he had counseled Husband on the nature and consequences of the transfer, or transfers, of certain percentages of his property to Sumrall, Junker, and Sharon Smith, and that on the basis of this counsel, he concluded the transfer or transfers were not the product of fraud, menace, duress, or undue influence. The record contains no other evidence of Charlton's counsel to Husband. According to the petition, when Conservator's attorney asked for a copy of Charlton's notes, Charlton stated that he had no notes. He said he had spoken only with Husband, not with Wife, and that he knew nothing about her condition or position on the gift. Conservator's attorney had written to Charlton asking for information on what he discussed with Husband at the independent review, but Charlton had not responded. The certificate states that Charlton had reviewed the April 2, 2010 amendment to the 1996 trust, but does not indicate he had reviewed the February 2010 amendment or the 1996 trust itself.

Conservator argues the court improperly accepted the certificate of independent review at face value, without inquiring into the adequacy of the counseling Husband received at the review. *Winans* is instructive on this point. The decedent there had executed a will leaving property to his care custodian. (*Winans*, *supra*, 183 Cal.App.4th at p. 108.) An attorney had counseled the decedent pursuant to section 21351 in the presence of another attorney and a notary public, informing him he was giving property to the caregiver, asking whether he had been pressured to give the bequest or whether there had been any threats or promises, and telling the decedent that if he had any problems with the caregiver, the attorneys would take care of them. The decedent said his bequest was voluntary. The counseling session lasted between one and five minutes. (*Winans*, *supra*, 183 Cal.App.4th at pp. 111–112.)

The decedent's niece and nephew, who were excluded from the will, challenged it, asserting among other things that the certificate of independent review was invalid. The trial court granted summary judgment in favor of the care custodian, and our colleagues in Division One of the First Appellate District reversed the ensuing judgment. (*Winans*, *supra*, 183 Cal.App.4th at p. 108.) In concluding there was a triable issue of fact as to the adequacy of this counseling, the court stated: "Proper counseling about the nature and consequences of a bequest to a disqualified person [] requires the attorney to ensure the testator understands (1) the nature of the property bequeathed; (2) that a disqualified person will receive the property; and (3) that the 'natural objects' of the testator's bounty, if any, will not receive the property. The certifying attorney must also ensure the testator voluntarily intends this result and does not believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest. This may require the certifying attorney to confirm, for example, the testator is aware the disqualified person has already been fully compensated for the services provided to the testator or otherwise has no legal claim on the testator's bounty." (*Winans*, *supra*, 183 Cal.App.4th at p. 117.)

Here, aside from the bare language of the certificate of independent review, there is no evidence of what counseling Husband received before Charlton executed the certificate. Moreover, the certificate indicated that Charlton had reviewed the April 2010 amendment, but did not show he had reviewed or knew the terms of either the 1996 trust itself or the February 2010 amendment—and therefore, there was no indication he counseled Husband about the effects of the amendment on the "natural objects" of his bounty. (See *Winans*, *supra*, 183 Cal.App.4th at pp. 116–117.) On this record, it appears Husband was a dependent adult, and the trial court had a duty to determine whether the counseling he received was adequate.

Moreover, as Conservator points out, no certificate of independent review was prepared for Wife. (§ 21350, subd. (c) & Welf. & Inst. Code, § 15610.23.) Respondents contend no certificate was necessary for Wife, because Husband was entitled to dispose of his half of the community property. For this contention, they rely upon section 100,

subdivision (a), which provides: " 'Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent,' " and upon the rule that "[e]ach spouse has the right of testamentary disposition over his or her half of the community property." (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 756; see also *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1437 [community property trust assets transmuted to separate property on decedent's death].) Here, however, the terms of the 1996 trust provided that during the lifetime of both spouses, it could be amended as to community property assets "by both settlors acting jointly." It did not provide for unilateral amendment of the trust while both spouses were alive. The issue, therefore, is not whether Husband had the right to make a testamentary disposition of his portion of the community property, but whether the couple validly made a joint amendment, during Husband's lifetime, to the disposition he *had* made.

Moreover, Wife's interests were affected by the transfer. Under the 1996 trust, "[o]n the deceased settlor's death, the remaining trust estate shall be distributed outright to the surviving settlor." The surviving spouse could then disclaim property, which would be put into the Disclaimer Trust, and distributed to named beneficiaries upon the death of the surviving spouse. Under the terms of the 2010 amendments, the surviving spouse's separate estate and one-half interest in the community estate would be held in the Survivor's Trust; with certain exceptions, the remainder of the trust estate would be held in the Bypass Trust. The spouse would receive all the net income from the Bypass Trust, and "as much of the principal of the trust as the Trustee deems reasonably necessary for the proper health, maintenance, support and education of the surviving spouse." Upon the death of the surviving spouse, with certain exceptions for tangible personal property, the residue of the Bypass Trust would go to the beneficiaries designated by the predeceased spouse. As a result of the amendments to the trust, then, the surviving spouse would have the right to less property than would have been the case under the 1996 trust. Additionally, if, as was the case here, Husband was the predeceased spouse, those beneficiaries would include the three caregivers, at the expense of Wife's

own family members. On these facts, we conclude the 2010 amendments effected a donative transfer from Wife to her caregivers that raised a rebuttable presumption of undue influence in the absence of a certificate of independent review.

On remand, the trial court shall consider and decide whether the presumption of undue influence has been overcome.

D. Litigation Counsel

Finally, Conservator contends the trial court abused its discretion in denying her request for authority to retain litigation counsel to investigate, and, if appropriate, pursue legal action against Pollak and Charlton. The trial court denied the request without prejudice, adding that if Conservator decided to initiate litigation against Pollak or Charlton, the court would consider the matter further. We cannot discern from the court's order to what extent its ruling was affected by its views on the questions of Wife's capacity to execute the 2010 trust documents and the validity of the gifts to the caregivers. In the circumstances, we shall reverse this portion of the order as well and direct the trial court to reconsider the matter after it has held an evidentiary hearing. In so ruling, we express no view on how the trial court should exercise its discretion.

III. DISPOSITION

The order appealed from is reversed, and the matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

_____
Rivera. J.

We concur:

_____
Ruvolo, P.J.

_____
Reardon, J.